

Reliable Electric Company; Reliable Electric Construction Company, Inc.; and Anthony Prilika and International Brotherhood of Electrical Workers, Local Union No. 68. Case 27–CA–8682

February 29, 2000

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On November 9, 1987, the National Labor Relations Board issued a Decision and Order in this proceeding in which it ordered the Respondent, Reliable Electric Company (Respondent Company), to make whole employees for wages lost, plus interest: six as a result of their unlawful discharges and any others who suffered as a result of the Respondent's failure to honor the union contract while they remained employed.¹ It further ordered that Respondent Company make whole the employees by remitting to seven trust funds contributions that it failed to make.

The United States Court of Appeals for the Tenth Circuit, in an unpublished judgment, enforced the Board's Decision and Order.

A controversy having arisen over the liability for the amount of payments due under the Board's Decision and Order, the Regional Director for Region 27 issued a compliance specification and notice of hearing on March 31, 1994, alleging the amounts of backpay due the discharged employees. The compliance specification also alleged that (1) Anthony Prilika is an "alter ego" of Respondent Company and Reliable Electric Construction, Inc. (Respondent Construction); and (2) Respondent Company and Respondent Construction are "alter egos and a single employer"; alternatively, Respondent Construction is Respondent Company's successor.

Thus, the compliance specification sought to hold Respondent Construction and Respondent Anthony Prilika jointly and severally liable to remedy the unfair labor practices of Respondent Company. A hearing was held before Administrative Law Judge Schmidt.

On August 29, 1996, Judge Schmidt issued the attached supplemental decision which, *inter alia*, added amounts due two employees who had remained employed and fell within the scope of the remedy. Respondents Construction and Anthony Prilika filed exceptions and supporting briefs, and the General Counsel and the Charging Party filed answering briefs. Respondent Prilika also filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt his recommended Order.

We adopt Judge Schmidt's recommendation to pierce the corporate veil in regard to Respondent Anthony Prilika. Under *White Oak Coal*, 318 NLRB 732, 735 (1995), the corporate veil may be pierced when:

(1) there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct and (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations. [Emphasis in original; citation omitted.]

Respondent Prilika and our dissenting colleague concede, as they must, given the record evidence, that the first prong is met. Thus, in his decision, the judge found that Prilika "infused Construction with the necessary cash, supplies and equipment—some of it his own, most of it Company's—to permit its operation without regard to corporate formalities" and that the "personalities and assets" of Company, Construction, and Prilika "are indistinct." These findings are based on extensive record evidence demonstrating not only a disregard of the corporate forms as between Company and Construction, but also a commingling of assets and lack of arm's-length dealing between Prilika and Respondent Companies, including evidence that Prilika and his wife contributed cash, equipment, and supplies to the startup of Construction, purportedly as loans for which there is no documentation; that Construction made and obtained numerous other undocumented loans to and from members of the Prilika family and others with whom they have business associations; and that vehicles purportedly purchased with Construction's money were titled in the name of another Prilika entity owned and controlled by Prilika.

The titling of Construction's vehicles is evidence in support of the second prong, *i.e.*, that respecting the corporate form as a bar against Prilika's personal liability is likely to lead to evasion of legal obligations. Blair Electric, the entity in whose name Prilika titled those vehicles, was at least ostensibly different from the entity against which the Board's Order ran. (At this point, according to the judge's findings, Blair Electric is little more than the name—"owned" by Anthony Prilika—of a defunct business that operated about 20 years ago.) Although, as our dissenting colleague notes, the vehicles were eventually transferred to Construction, this was not done until more than 2 years after three of them were originally purchased and more than 1 year after purchase of the others. In the interim those vehicles could not have been reached as assets of Construction, and there is no assurance, given the fluidity of transactions among these various entities, that they might not be transferred back to an entity not named in the Order.

As for the loans to and from Construction, the point is not that Anthony Prilika was pouring money into Construction. The point is, as the judge found, that it is un-

¹ 286 NLRB 834.

certain how much money was actually loaned, since the loans were undocumented, and, as the judge further noted, Anthony Prilika's son, Robert, Construction's president and treasurer, was unable to state "when Construction would complete the repayment of his parents' loans." As the judge found, weekly salary payments of \$850 from Construction to Prilika were being characterized as loan repayments, and theoretically these could continue indefinitely even if Prilika were performing no work. Thus, the assets of the alter ego company against which the order runs are subject to claims by Anthony Prilika in amounts that are impossible to determine accurately. If he secures substantial payments on his claims before the Board seeks payment of what is due under its Order, Prilika may personally possess the money needed to satisfy the Board's claims; and there is no assurance that his payments from Construction will not exceed whatever amounts he may have supplied to it.

In short, in the absence of a finding of personal liability, Respondent Prilika's efforts to evade his legal obligations will, in effect, be sanctioned. Contrary to our dissenting colleague, it is not merely "speculative" that Prilika will manipulate Construction, as he did Company, in a way that hampers recovery of the amounts necessary to satisfy the underlying backpay liability. As the judge found, Construction has no distinct corporate identity or assets, and appears to be entirely dependent on Prilika's support and day-to-day services for its continuing viability; and as the titling of the vehicles discussed above indicates, Prilika cannot be counted upon to desist from his previous course of fraud and evasion and assure that Construction will satisfy that liability.

For these reasons, we find that it is appropriate to pierce the corporate veil and hold Respondent Prilika personally liable, jointly and severally with the Respondent Companies, for the backpay due in this case.

ORDER

The National Labor Relations Board orders that the Respondents, Reliable Electric Company; Reliable Electric Construction Company, Inc.; and Anthony Prilika, Denver, Colorado, their officers, agents, successors, and assigns, shall make whole the employees named below, or in the case of James Belshe, his estate, by paying them the amounts following their names, as well as any additional amounts of backpay that may have accrued since January 31, 1993, or which may accrue hereafter, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholding required by Federal and state law. The Respondent shall also remit to the trust funds the contributions which the Respondent failed to make, plus additional amounts, if any, as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).²

² To the extent that an employee has made personal contributions to funds that are accepted by the funds in lieu of the employer's delin-

Net Backpay	
James Belshe Estate	\$ 50,303
Wesley Steven Goodwin	4,971
Robert Holcomb	175,144
Bill Jackson	93,606
Bruce Knoke	111,037
Kim MacIntyre	30,513
Robert McFarren	4,691
Dale Wittwer	29,109
TOTAL BACKPAY	\$499,374

Contributions Owed	
Electrical Industry Benefit Health Fund	\$ 7,870
Electrical Industry Benefit Long-Term Disability Fund	191
Electrical Industry Benefit Accidental Life Insurance Fund	507
Eighth District Electrical Pension Fund	7,933
National Employee's Benefit Fund	3,308
National Electrical Industry Fund	1,102
Joint Apprenticeship and Training Fund	331
TOTAL CONTRIBUTIONS	\$ 21,242
TOTAL AMOUNTS DUE	\$520,616

MEMBER HURTGEN, dissenting in part.

I do not agree that the General Counsel has established a sound basis for piercing the corporate veil and proceeding personally against Anthony Prilika.

Under *White Oak Coal*, 318 NLRB 732 (1985), the corporate veil can be pierced if (1) there is a lack of respect for the separate identity of the corporation and the shareholder; and (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to evasion of legal obligations.

The majority has focused on the first element. Prilika concedes that this part of the test is met. However, I do not agree that the second element has been established. That is, Anthony Prilika may have ignored the corporate form by infusing Construction with his personal assets, but, in view of the fact that the Board is holding Construction liable, it is difficult to see how Prilika's infusion of his assets *into Construction* would result in a fraud, injustice, or evasion of legal obligations.¹

quent contributions during the period of the delinquency, the respondent will reimburse the employee for amounts paid, with interest, but the amount of such reimbursement will constitute a setoff to the amount that the respondent otherwise owes the funds. See *Donovan & Associates*, 316 NLRB 169, 170 (1995).

¹ Compare: *NLRB v. West Dixie Enterprises*, 190 F.3d 1191 (11th Cir. 1999), where it was undisputed that respondent West Dixie's corporate funds were used to pay rent on the individual's personal apartment.

The majority acknowledges that Prilika gave assets to Construction, not the other way around. They then speculate that Prilika, in the future, may withdraw his support from Construction, and thus there would be no entity to satisfy the remedial obligation. The evidence does not support this speculation. If and when it happens, and if it is done to avoid liability, *then* there may be a basis for proceeding against Prilika.

Similarly, the evidence shows that Prilika made loans to Construction. My colleagues seem to bemoan the fact that Construction is repaying the loan through weekly payments. In my view, there is nothing improper in the repayment of a loan. Indeed, that would seem to be an indicium of an arm's-length transaction.

With respect to the vehicles which were titled, upon acquisition, in the name of Blair Electric, the evidence shows (at most) that Prilika did this to provide a "tax shelter." Of course, some "tax shelters" are quite lawful, and there is no evidence here of tax fraud. Further, the evidence in the instant case is that the vehicles were subsequently transferred to Construction. Thus, it is difficult to see how this transaction was designed to diminish Construction's capacity to remedy an unfair labor practice.

As noted, the vehicles have been transferred to Construction. My colleagues seek to discount this by saying that the vehicles stayed in Blair's name for a period of time. However, the salient fact is that they were transferred to Construction at a time when the Board's Order was running against it. In these circumstances, it is difficult to find an intent to evade the legal obligations of Construction.

My colleagues also speculate that these vehicles might be transferred back from Construction in the future. There is no record evidence to support this speculation.

Finally, the majority says that Construction made loans to members of the Prilika family. The record shows *no* loans to Anthony Prilika. Although there was a \$5000 loan to Anthony Prilika's son John, the evidence does not establish that the loan was made at less than prevailing market rate. In these circumstances, I conclude that the General Counsel has not met his burden to show that there has been fraud, injustice, or evasion of legal obligations.

Daniel F. Collopy, Esq., for the General Counsel.

Daniel J. Collyar and Kathryn Rackleff, Esqs. (Coan & Collyar), of Denver, Colorado, for the Respondent.

Lynne L. Hicks, Esq. (Donald P. MacDonald, P.C.), of Denver, Colorado, for the Charging Party.

Anthony Prilika, pro se.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. This hearing in this case was to determine the formula and details for computing the backpay due under the National Labor Relations

Board's Order, as modified and enforced, in *Reliable Electric Co.*, 286 NLRB 834 (1987), as well as those persons responsible for paying the backpay due.¹ For reasons detailed below, I find that liability for paying the backpay extends to all persons named in the compliance specification, and that the Acting Regional Director adopted a reasonable gross backpay formula but erred as to the appropriate hourly rates applied for a portion of the backpay period, the inclusion of medical premium reimbursements, the quarterly allocation of one individual's interim earnings, and the failure to include reimbursements for underpaid wages at the outset of the backpay period. In reaching these conclusions, I have rejected Respondents' claims about extending liability to other persons not named in the original complaint, about the appropriate hourly rate to be used in the Acting Regional Director's gross backpay formula, and about tolling the backpay generally as well as in certain specific instances. I also corrected certain inadvertent errors.

This compliance specification issued on March 31, 1994, over the signature of the Acting Regional Director for Region 27 of the National Labor Relations Board (the Board or NLRB).² In addition to the usual detailed allegations concerning the backpay computation, the specification also alleges that:

- (1) Anthony Prilika is "an alter ego" of Reliable Electric Company and Reliable Electric Construction, Inc.; (2) that Construction is Company's successor; and (3) that Company and Construction are "alter egos and a single employer." A detailed answer was filed on behalf of the Respondents' admitting certain allegations and denying others.

I conducted a 5-day hearing in this case between December 13, 1994, and January 24, 1995, at Denver, Colorado. Having carefully considered the record,³ the demeanor of the witnesses while testifying, and the posthearing briefs of the General Counsel, Local 68, and Construction, I now make the following

FINDINGS OF FACT

I. BACKGROUND AND ISSUES

In the underlying case, the Board concluded that Company unlawfully repudiated a binding 8(f) collective-bargaining agreement when its president, Anthony Prilika, informed employees at a meeting on January 24, 1984, that Respondent no longer considered itself bound by the Union's commercial

¹ The United States Court of Appeals for the Tenth Circuit entered an unpublished judgment enforcing the Board's Order on May 4, 1992, in Case 92-9520.

² At the hearing, the General Counsel amended the compliance specification's appendices containing the detailed calculations to correct certain errors and to recalculate the interest due to December 13, 1994, the start of the hearing. GC Exh. 97. In all instances, GC Exh. refers to the General Counsel's exhibits; R. Exh. refers to Respondent Construction's exhibits; and R. Prilika Exh. refers to Respondent Prilika's exhibits. Those exhibits designated as "Government" exhibits are hereby corrected to substitute "General Counsel" in place of that designation.

³ At the hearing, I received R. Exhs. 29 through 34 provisionally in order to allow for briefing of the General Counsel's objection. I now receive those exhibits without reservation. By an earlier order I received R. Exh. 35 as a late filed exhibit in accord with arrangements at the hearing. My order receiving and the entire exhibit, including the foundation affidavit, are now included in the record. Finally, I hereby designate the detailed alternate backpay computation appended to Respondent's brief as R. Exh. 41 and receive that exhibit to insure a complete record for consideration by any future tribunals.

agreement and offered to continue the employment of unit employees in accord with unilaterally established individual employment contracts. As this action “effectively presented the [unit] employees with the Hobson’s choice between continued employment with lower wages and benefits or no employment at all,” the Board concluded in its November 9, 1987 decision that Company constructively discharged six employees who quit rather than work without a union contract. 286 NLRB at 836.

The Board’s remedial order included two separate backpay requirements. Relying on its long-established precedent in *Ogle Protection* and *Kraft Plumbing*,⁴ the first part requires Company, in effect, to reimburse *all* unit employees by paying them “for any losses they may have suffered as a result of [Company’s] failure to adhere to the commercial agreement since January 1984, with interest.” 286 NLRB at 836. Although the Board initially limited this portion of its remedy until March 31, 1986, when the commercial agreement was, by its terms, to expire, it subsequently modified this portion of its original Order. (GC Exh. 1(b).) As modified, the effective period of the *Ogle* remedy was “tolled as of June 1, 1984,” because the original 1983–1986 commercial agreement was supplanted by a new agreement effective June 1, 1984, pursuant to the terms of a “settlement agreement,” apparently referred to in Judge Litvack’s decision. 286 NLRB at 840 at fn. 14.

The second portion of the backpay remedy requires Company to make six constructively discharged employees—James Belshe, Robert Holcomb, Bill Jackson, Bruce Knoke, Kim MacIntyre, and Dale Wittwer—“whole for any loss of earnings and other benefits, computed on a calendar quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less any net interim earnings.” Company had ceased business for over 2 years by the time the court of appeals enforced the Board’s modified Order on May 4, 1992.

The Acting Regional Director’s compliance specification alleges that a controversy exists only as to the amount of backpay due the forenamed six discriminatees, including contributions on their behalf to certain trust funds established under the commercial agreement. The specification contains no allegations concerning the *Ogle* portion of the Board’s remedy for any employees. Allegations of trust fund reimbursements under *Kraft* relate solely to the six named discriminatees. The compliance specification calculated the backpay due through January 31, 1993. Admittedly, no offers of reinstatement sufficient to toll the future accrual of backpay have been made to any of the discriminatees to date.

As to the liability issue, the compliance specification seeks a finding that Construction, another similarly named Denver electrical contractor, and Anthony Prilika in his personal capacity are jointly and severally liable along with Company for paying the backpay due and making the required trust fund contributions. On this question, the General Counsel claims that Construction is Company’s alter ego and *Golden State* successor.⁵ In addition, the General Counsel claims that Anthony Prilika is the alter ego of both Company and Construction, and engaged in conduct which warrants piercing the corporate veils to impose liability upon him personally.

Construction denies that it is either Company’s alter ego or *Golden State* successor. But assuming otherwise, Construction further claims that the General Counsel’s gross backpay computation employs an excessively high hourly rate of pay for the six constructively discharged employees in the periods following May 31, 1984, that the backpay should be tolled entirely at a much earlier date or, alternatively, that it should be tolled for certain specific periods in individual cases, and that the claimed reimbursements for certain discriminatees’ medical insurance premiums are not appropriate. Prilika asserts that no basis exists to hold him personally liable, and I have assumed that he joins in Construction’s claims concerning the gross backpay computation.

II. THE SCOPE OF BACKPAY LIABILITY

A. Relevant Facts

Anthony Prilika was educated as an electrical engineer at Zagreb University. Since coming to this country, he received further education in contract litigation at Pepperdine University, became a member of the American Arbitration Association, passed the master electrician examinations, and became licensed as such in the State of Colorado as well as the city of Denver. For a number of years Anthony also has been a member in good standing of Charging Party, Local 68.

Anthony’s first foray into the electrical contracting business occurred between 1970 and 1975. During that period he owned and operated a business called Blair Electric. Anthony claims that at some point in 1975 or 1976 he sold Blair Electric but he retained ownership of the Blair Electric name and apparently some of its vehicles and equipment. Over the years, he purchased equipment and supplies through Blair Electric for use in his other enterprises in order to take advantage of a more favorable sales tax rate resulting from Blair’s address.

In 1976 Anthony purchased Company, a going enterprise that had been engaged in the electrical contracting business since approximately 1920. Through the remainder of Company’s formal existence, Anthony was its president, chief executive officer, sole shareholder (apparently until 1988), corporate director, and registered master electrician. To comply with the minimum requirements of Colorado corporate law relating to the requisite number of officers and directors, Anthony named his son, Robert (15 years old at the time), and his wife, Kathy, as corporate directors and as corporate vice president and secretary-treasurer, respectively. Except for minor receptionist-type duties late in Company’s operation, Kathy never actively participated in Company’s affairs and Robert did not become active in Company, save for summer employment while he attended school, until about 2 years after he graduated from college in 1984. From early 1986 until he quit in February 1987, Robert worked at Company as its service manager, warehouseman, and parts runner. After Anthony suffered a heart attack in the late summer or early fall of 1988, Robert returned to Company in September as a project manager. At this time, Robert acquired a 25-percent ownership interest in Company; Anthony retained the other 75-percent interest. Apparently until his father returned in mid-November, Robert essentially became responsible for Company’s overall operations.

For the decade between 1980 and 1990, Company operated from a property located at 1740–8 South Broadway in Denver which it leased from Kathy Prilika. Under that lease arrangement, Company paid the taxes, insurance, and the debt load on

⁴ *Ogle Protection Services*, 183 NLRB 682 (1970), and *Kraft Plumbing*, 252 NLRB 891 (1980).

⁵ *Golden State Bottling v. NLRB*, 414 U.S. 163 (1973).

the property directly. A building at that location served as Company's offices and warehouse, and the grounds served as a yard for the storage of its vans, trucks, and equipment.

Over the years, Company performed electrical contracting or subcontracting work in Colorado that included new construction work or remodeling for commercial and industrial customers as well as electrical service work for individual and corporate customers. Between 1980 and 1988, Company operated under the protection of a Chapter 11 bankruptcy proceeding. On May 7, 1992, 3 days after the Tenth Circuit's judgment in this proceeding and more than 2 years after it ceased operations, Company filed a Chapter 7 bankruptcy liquidation proceeding. Later, its charter as a Colorado corporation was revoked and its corporate existence ceased.

In addition to Company's state electrical contractor's license—apparently transferred to Anthony when he purchased Company in 1976—Anthony also obtained a general contractor's license. In the early 1980s, Anthony performed a few jobs as a general contractor using a wholly owned entity which he named Reliable Construction Company, Inc., an entity not to be confused with Respondent Construction in this case. Despite this corporate designation, Anthony had no recollection that he ever took steps to formally incorporate Reliable Construction and no independent evidence was adduced that this entity in fact had been incorporated.⁶ According to Anthony, Reliable Construction never performed any work after the early 1980s but nonetheless it opened a commercial checking account at the United Bank of Lakewood in Lakewood, Colorado, in June 1989 under the name of "Reliable Construction Company Inc, d/b/a Reliable Electric" and, for reasons which remain unclear, that account was used as a conduit for the payment of payroll taxes.

The claim is made that after Robert returned to Company in 1988, he and his father undertook to finish up the work in progress and close down Company's operations, a process which purportedly continued throughout 1989 and into the first quarter of 1990. Anthony blamed Company's decline on the poor business climate at the time as well as Company's lack of credibility resulting from the protracted Chapter 11 proceeding. In any event, it is argued that Company's slow demise caused Robert to take steps toward securing his own future by forming Construction to engage in the electrical contracting business himself.

Robert formally incorporated Construction on March 15, 1990. Respondent Construction's Exhibits 6 and 7. Robert and Anthony are listed in the articles of incorporation as the two initial directors. A stock certificate in Robert's name reflects his ownership of all 50,000 shares of Construction's stock. Robert admittedly selected Construction's name to take advantage of the fact that the name had "been . . . around since 1920." There is no dispute about the fact that Construction operated from the same location as Company; utilized the same telephone number; retained the same distinctive logo on its letterhead, vehicles, and equipment; and, judging from successive telephone book advertisements; engaged in precisely the same type of work. General Counsel's Exhibits 23 and 24.⁷ In

the ensuing months, Company's Colorado electrical contractor's license was transferred to Construction.

Robert serves as the president and treasurer of Construction and Anthony serves as its vice president. Although Anthony acknowledged his status as Construction's vice president, he asserted repeatedly at this hearing that his title was a mere technicality. Nevertheless, he devotes fulltime to his duties with Construction and serves as Construction's master electrician, the key to Construction's ability to operate as an electrical contractor. In mid-1990, John Prilika, Robert's brother, became Construction's corporate secretary. Robert and John are now Construction's corporate directors.

Acting in their capacity as Construction's board of directors, Robert and John annually executed a "Unanimous Consent" document electing themselves to the aforementioned offices, Anthony to the vice president's office and fixing their "annual salaries." See General Counsel's Exhibit 84. These documents fixed their 1991, 1992, and 1993 Construction salaries as follows: Robert—\$40,000; Anthony—\$44,200; and John—\$32,000. Nevertheless, Anthony claims that he receives no compensation for his services at Construction; instead he purportedly applies the amount of his weekly check (presently \$850 per week payable to him or his wife) against his outstanding loans to Construction. The "Unanimous Consent" documents are silent as to this arrangement.

Robert asserts sole ownership of Construction and Anthony denies that he ever had any ownership interest in Construction. A massive paper trail disputes their current claims. For example, Construction's Federal income tax returns for the years 1990 and 1991 both reflect an ownership split between Anthony and Robert of 75 and 25 percent, respectively, the same ownership split which existed at Company after Robert returned in 1988. General Counsel's Exhibit 16 at p. 2; General Counsel's Exhibit 17 at p. 2. On a Small Business Administration (SBA) loan application forms dated in September 1992, Anthony and his wife Kathy declared that they own 37,500 shares of "Reliable Electric Const., Inc." worth \$300,000 "based upon 12/31/91 book value" and Robert declared that he owned 12,500 shares of "Reliable Electric Construction, Inc." worth \$100,000 "based upon book value of 100,000 at 12/31/91." Robert further declared that these shares had been gifted to him. General Counsel's Exhibits 39 and 40. The statement of financial condition as of December 31, 1991, prepared for Anthony and Kathy Prilika lists one of their assets as "Reliable Electric Construction, Inc.," valued at \$300,000.⁸ General Counsel's Exhibit 58. Anthony stated in a 1992 deposition provided to the General Counsel that he owned 75 percent of Construction even though he claimed at the time that it was merely security for the loans he had made to that firm. General Counsel's Exhibit 15.

Construction's initial complement of employees unquestionably came directly from Company. Thus, a comparison of

⁶ Given the overall evasive nature of Anthony's testimony, I infer from Anthony's purported lack of recollection that Reliable Construction Company, Inc. was never incorporated.

⁷ John Prilika worked for both Company and Construction as a journeyman electrician. He testified that there were significant differences between the two companies in terms of the types of work they pursued.

According to John, Company's principal business involved service work whereas Construction was primarily a commercial and industrial electrical contractor. Thus, John claimed that Company had 18 service vans but Construction only had 1. Regardless of the veracity of his claim about the vans, I do not credit his claim that Construction's work differed considerably from Company's. Other independent evidence demonstrates that Company also performed a substantial amount of commercial and industrial contracting work over the years.

⁸ Presumably, this statement of financial condition served to support the claim made in the SBA loan application as the two are parallel.

Company's unemployment insurance tax report for the first quarter of 1990 and the same report of Construction for the second quarter of 1990 shows that Construction employed 17 of the 19 individuals (including Robert and John Prilika) who had been employed by Company in the first quarter. (GC Exh. 8 at pp. 15-16; GC Exh. 10 at pp. 1-2; and GC Exh. 9 at p. 8, showing Construction employed 17 individuals subject to the tax during the payroll period which included the week in which April 12 fell. See also R. Exh. 13.) An unemployment insurance tax report filed in September 1990 and signed by Anthony reflects that Company had no employees after January (GC Exh. 8 at p. 13) and the agency's records lists Company's account as "inactive" as of March 31, 1990. General Counsel's Exhibit 8 at p. 2. All told, Construction employed 72 individuals during the 1990 calendar year. The bulk of these individuals were obviously employed intermittently or for limited periods typical in the construction industry.⁹ Construction's employee wage rates and benefits appear to have been virtually identical to Company's during this transition.

Robert claims Company "orally" assigned all of its work in progress to Construction when it commenced operating on March 15, and that the general contractors involved consented to these oral assignments. One project commenced by Company and completed by Construction involved the electrical subcontract at the Longmont Life Care Center. Richard Storck, owner of Storck Development Corporation and the general contractor at the Longmont job, testified that he never consented to the transfer of the electrical subcontract on that job from Company to Construction. In fact, Storck testified that he had never heard of Construction until contacted by the General Counsel about this case.

In the years preceding its demise, Company had also performed electrical subcontracting work for Pinkard Construction on at least one occasion. In May 1990, Robert, assertedly acting on behalf of Construction, submitted a proposal to Pinkard for electrical work on a job known as the St. James Project, Phase I. However, the cover letter for that proposal is written on Company's letterhead and the signature block, signed by Robert as president, uses Company's name. Among other items transmitted with the proposal is a document titled "Financial Statements for the years 1988, 1989," which clearly sets out Company's financial position and not Construction's. General Counsel's Exhibit 89.

Mark Olesen, Pinkard's project manager on the St. James job, testified that he had no recollection of any notice that Company had gone out of business or had closed its doors as the Prilikas claim here. Indeed, Olesen directed a raft of change order proposals addressed to Company that run into the 1991 calendar year. General Counsel's Exhibit 91. However, Olesen testified that, in preparation for testifying at this hearing, he discovered a December 1990 notice to his firm's accounting department requesting that checks for the St. James project payments under the electrical subcontract be made payable to Construction.

Robert also testified that Construction, rather than Company, performed the electrical subcontracting work at that Breckenridge Town Square project. Nevertheless, other evidence shows

that a surety bond for that work issued in late May 1990 bearing Company's name covering a subcontract entered into between M. A. Mortenson, the general contractor, and "Reliable Electric." General Counsel's Exhibit 93.

After Construction commenced operations, Robert typically corresponded with contractors, suppliers, and others as the president of Construction and Anthony typically used his title as vice president. In a few notable instances, however, Anthony signed documents using other titles or making representations relating to his position at Construction. Thus, in a notarized document included as a package of materials transferring ownership of certain vehicles from Blair Electric to Construction so that the Westminster Bank could record a security interest against them as collateral for Construction's new credit line, Anthony states that he is the "principal of Blair Electric" and "also the principal of Reliable Electric Construction, Inc." General Counsel's Exhibit 44. On other occasions, Anthony signed documents for Construction using the title "CEO." General Counsel's Exhibits 9, 37, and 38. And in a letter purportedly submitted to a bonding company used by Construction, Anthony stated that in the event of his death Robert "will assume complete control of Reliable Electric Const., Inc." General Counsel's Exhibit 42.

Robert claims that he financed Construction's startup mainly with \$105,000 in "prebillings" received before it commenced operation. This assertion lacks any documentary support or other form of corroboration. Anthony admittedly contributed considerable financial support to start Construction. By his own admission, the degree of his and his wife's financial involvement with Construction's startup, purportedly in the nature of loans, reached somewhere from \$180,000 to \$200,000 in cash, equipment, and supplies.¹⁰ No loan documents exist to memorialize these financial contributions. According to Robert, he and his father have a dispute about the amount of his parents' contribution to Construction. During a 1992 deposition provided to the General Counsel, Robert could not state when Construction would complete the repayment of his parents' loans under the system adopted or agreed to by Anthony of applying his weekly \$850 payment to reduce that loan nor could he identify any documents which would aid in that calculation.

Both Robert and Anthony executed continuing guaranty agreements on December 8, 1989, personally guaranteeing the payment of a new \$75,000 line of credit for Company at the 1st National Bank of Westminster in Westminster, Colorado (Westminster Bank). As a precondition for extending this line of credit Westminster Bank required Company to obtain a release of certain outstanding Internal Revenue Service liens against Company dating back to 1986 so the bank could "have a valid first lien position on all accounts, accounts receivable, inventory and equipment." Grail Kister, Westminster Bank's vice president in charge of business loans, explained in a November 16, 1989 letter to the Prilikas that even though they were "renaming the company to Reliable Electric Construction Co., Inc. and placing it under a holding company [by the] name of A&R Investments" this action would "not eliminate the lien

⁹ Thus, 7 earned \$1000 or less; 15 earned \$1001 to \$2000; 13 earned \$2001 to \$4000; 13 earned \$4001 to \$6000; 3 earned \$6001 to \$8000; 2 earned \$8001 to \$10,000; and 18 earned more than \$10,000. Of the 18 earning more than \$10,000, 12 worked for Company in the first quarter of 1990. See GC Exh. 82 and GC Exh. 8 at pp. 15-16.

¹⁰ Eric Jonson, a certified public accountant retained by Anthony for a period of time beginning in August 1991, testified that, based on his conversations with Anthony, he booked the value of the fixed asset contributions to Construction at \$22,000 and the value of the supplies contributed at \$104,000. Jonson could recall no mention of cash contributions.

filing by the IRS" against Company. General Counsel's Exhibit 27. Kister testified that the Prilikas discussed A & R in the context of a holding company arrangement for estate planning purposes in one of their first meetings early in November 1989 preliminary to establishing a banking relationship.¹¹ In any event, Robert Prilika furnished Westminster Bank with a release of lien document obtained from the IRS in order to complete the transaction somewhere around December 12, 1989 (GC Exh. 27), and the line of credit documents were executed on December 19, 1989.¹² General Counsel's Exhibits 29, 30, 31, and 32.

A business checking account was also opened at the Westminster Bank on December 8, 1989, concurrent with Company's efforts to obtain a new line of credit at that bank. (GC Exh. 21.) Although this checking account bore Company's tax identification number (Compare: GC Exh. 21 and GC Exh. 27, Certificate of Release of Federal Tax Lien), this account was opened in the name of "Reliable Electric Construction, Inc." Regardless, Company's current income receipts were clearly deposited in that account. Thus, on December 20, a deposit was made to this account in the amount of \$16,059.97. On December 28, another deposit was made to this account in the amount of \$7582.30. Copies of the checks, cash ticket, and deposit slips underlying those two deposit transactions reflect that all of the checks deposited were made payable to Company or endorsed with Company's stamp. Although the generic deposit slips both bear Company's name (one written in hand, the other stamped), the preprinted account number on the deposit slip is for the account in Construction's name. Immediately thereafter, four additional deposits—with Company's name stamped on the deposit slips—were made to this account on December 29 (\$4,173.56), January 3 (\$3,808.79), January 5 (\$4,049.51), and January 16 (\$25,257.69). General Counsel's Exhibits 103 and 104. The customer checks underlying all those deposits were either made clearly payable to Company or endorsed using Company's endorsement stamp. Beginning with a January 26, 1990 deposit, a preprinted deposit slip bearing Construction's name and account number was utilized for the deposits to this account. Between January 26 and February 23, 1990, seven more deposits of checks totaling \$93,051.40 payable to Company or endorsed with Company's stamp were made to Construction's account at Westminster Bank. General Counsel's Exhibits 104 and 105. Robert explained that these deposits resulted from a mistake the bank made in printing deposit slips and that these deposits should have gone into another account at Westminster Bank, presumably belonging to Company. There is no evidence that this mistake was rectified by corresponding deposits to an account belonging to Company. In fact, there is no evidence that either Construction or Company had any other account at the Westminster Bank apart from a savings account in Construction's name.¹³

¹¹ A & R Investments was incorporated in October 1989. John and Nancy Prilika, both children of Anthony and Kathy, were its initial directors. Kathy Prilika apparently has apartment house investments. John testified that "A & R" stood for Accurate and Ready Investments, an entity he formed to do maintenance and electrical work for apartment owners that never got off the ground due mostly to the high cost of liability insurance.

¹² Later in June 1990, Construction established its own line of credit at the Westminster Bank personally guaranteed by Robert and Anthony.

¹³ At one point, Westminster Bank Vice President Kister testified that he thought there were two checking accounts as he recalled some

Moreover, throughout the first quarter of 1990, payroll checks for Company's employees were drawn on Construction's Westminster Bank account. General Counsel's Exhibit 88. Linda Hill, the bookkeeper for both Company and Construction, could not explain why Company's payroll was paid from Construction's account and she knew of no other account which could have been used to write the payroll checks. Robert asserted that this occurred because of prior planning on his part in setting up his own company. This prior planning, however, did not extend to the purchase of workers compensation insurance by Construction as that was not done until late May 1990, more than 2 months after at least 17 employees commenced working for Construction.

In addition, Robert identified at least one check from this account of Construction as a payment on Company's line of credit at the Westminster Bank even though he claimed Construction never had access to Company's Westminster Bank credit line.¹⁴ And as previously noted, a series of checks were drawn on Construction's Westminster Bank account to Reliable Construction (the dormant general contracting company owned by Anthony) or the United Bank of Lakewood and a series of Reliable Construction checks were drawn on its United Bank account for equal amounts payable to the Internal Revenue Service. Robert explained that for a period of time after Construction began operating, it put money into the Reliable Construction checking account and then Reliable Construction paid the payroll withholding taxes for Construction's employees. Robert had no explanation whatsoever for this procedure and even conceded that the whole process appeared to be unnecessary paperwork.

Apart from Anthony, Construction obtained or made numerous loans to members of the Prilika family and others with whom they have business associations. Thus, in the course of identifying the purpose of specific checks, Robert testified that Construction made a \$2500 loan to John, that he had loaned Construction approximately \$23,000, and that an entity known as P & P Development, owned by his mother and an Dr. John Popov, and managed by Anthony, had loaned money to Construction. As in Anthony's case, no loan documents exist in connection with these loans.

Over the years, Cashway Electric Supply Co., Inc. (Cashway) served as one of Company's sources for electrical supplies in its construction and remodeling work. Construction also purchased supplies from Cashway after it commenced business in March 1990. Cashway's records reflect that Company and Construction purchased supplies in the following

confusion at the time. However, Kister further testified that he had little to do with this operational side of his bank's business and otherwise expressed such a degree of uncertainty about the existence of two checking accounts that I am unable to rely on his testimony to conclude that both Company and Construction had overlapping checking accounts at that institution. Even assuming that some of Company's records were destroyed, the existence of two separate checking accounts could easily have been resolved conclusively with other evidence but it never was.

¹⁴ No conclusive evidence was produced to contradict this claim. However, there is evidence that raises serious suspicions. Thus the balance sheet submitted with Construction's Cashway credit application (GC Exh. 78) reflects a negative balance in the Westminster checking account that exceeds \$12,000 in March 1990, prior to Construction's separate line of credit at that bank. It is inconceivable to me that the bank would have permitted such a development without some alternate source of funds.

amounts: 1987—\$338,539.32; 1988—\$163,502.25; 1989—\$167,215.03; 1990—\$342,083.16; 1991—\$340,118.47; 1992—\$388,952.28; 1993—\$426,091.60; 1994 (through October) \$780,659.92. General Counsel's Exhibit 79.

On July 9, 1990, Robert filed a credit application with Cashway in Construction's name. Attached to that application is a balance sheet and a "consolidated" profit-and-loss statement as of March 1990, the first month Construction purportedly operated.¹⁵ Robert claimed that these financial statements belonged to Construction. If so, according to the balance sheet Construction appears to have been in quite good shape during its first month of operation as it had total assets of \$961,410.87 and total liabilities of \$115,429.69. General Counsel's Exhibit 78. In addition, the profit-and-loss statement lists Construction's income for the period of January through March 1990 at \$419,100.95.

One of the final financial statements prepared for Company and an early financial statement prepared for Construction present the following picture. In the first place, Construction's financial statement (GC Exh. 96) purports to cover the 1989 and 1990 calendar years even though it was not incorporated until March 15, 1990. Moreover, virtually all of the 1989 entries in Company's financial statement (GC Exh. 51) are identical with the entries in Construction's financial statement for the same year. Note 1(a) to Construction's financial report states that although it has been in business since 1920, "it has been owned by the Prilikas since 1975." General Counsel's Exhibit 96 at p. 5. Further, footnote 3 to Construction's financial statement states: "The Company had *no tax liabilities after using net—operating—loss carry forwards from prior tax years.*" General Counsel's Exhibit 96 at p. 6. (Emphasis added.) No evidence shows that Construction, independently, had "prior tax years" before 1990, the last year covered by this financial report.

Robert denies that he knew anything about the underlying case until the General Counsel telephoned him in 1992 demanding that Construction comply with the terms of the Board's Order. John Prilika denied that his father had ever talked to him about this case but admitted that some of the six discriminatees had mentioned to him over the years that they were "suing" his father.

B. Further Findings and Conclusions

1. Credibility

In determining the relevant facts above and the conclusions below, I have given no credence to the testimony of Anthony and Robert explaining the demise of Company and the founding of Construction except where their testimony has substantial corroboration from other sources, is uncontested, or amounts to a clear statement against interest. In the main, their testimony is evasive, contradictory, unresponsive, and, in my judgment, blatantly self-serving.

Both Anthony and Robert went to astonishing lengths in their incredible effort to explain away the critical documentary evidence proffered by the General Counsel. Thus, both Anthony and Robert claim that they signed the SBA loan applications in blank in order to suggest that their own statements of Construction's ownership division between them had been erroneously entered on the forms by someone else. The same

¹⁵ No indication was provided as to why the profit-and-loss statement was treated as "consolidated."

ownership division appearing on the Federal income tax returns is, according to Robert, a mistake attributable to Anthony (to whom he delegated the duties of preparing the tax returns and the equally mystifying financial statements) that he did not discover until deposed by the General Counsel in 1992. Anthony engaged in argumentative bickering with counsel for the General Counsel over the meaning of the word "principal" when confronted with the vehicle transfer documents. Robert explained that Construction actually paid for those particular vehicles but his Machiavellian father titled them in the name of Blair Electric "[s]o he could have control over me." Anthony accounted for the "CEO" designation on the city of Lakewood form by speculating that the form had probably been prepared for Robert's signature. After CPA Eric Jonson testified that he had obtained the information for the Prilikas December 1991 statement of financial condition (reflecting their majority interest in Construction) from Anthony and his wife, Anthony attempted to suggest that the accountant may have misunderstood him because of his accent, presumably Serbo-Croatian, a very improbable circumstance.

Their lack of veracity even extends to relatively minor matters. When asked to identify Linda Hill, Anthony attempted to suggest that she had worked for Company for a relatively short time when in fact she had been employed continuously by Company and Construction since September 1989.¹⁶ When asked if Robert was the vice president of Company in April 1997 as reflected in one exhibit, Anthony testified, "I don't know." Robert claimed that a mistake was made on his own personal resume in that it reflects that he has been employed continuously for "Reliable Electric Construction, Inc." for the periods from May 1976 to February 1987 and again from August 1988 to the present. John's resume contains a similar reference and he too claimed mistake.

Finally, the fundamental premise, underlying Respondents' whole argument, that Company spent 1989 and the early part of 1990 completing work in anticipation of closing lacks a credible quality. Thus, the evidence shows that Company commenced its work at the Longmont project in late 1989 and, according to Robert, commenced the bid preparation work in early 1990 for the St. James Place project. It strikes me as highly improbable that a company engaged in closing up shop would engage in these relatively major undertakings.

2. Construction's liability

A "mere technical change in the structure or identity of [a successor] employing entity . . . without any substantial change in ownership or management" may result in the conclusion "that the successor is in reality the same employer . . . subject to all the legal and contractual obligations of the predecessor." *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 259 fn. 5 (1974). Identical ownership is not the sine qua non of the alter ego concept. The Board has found an alter ego relation-

¹⁶ Anthony's testimony to which I refer is as follows:

Q. Have you ever seen Linda Hill's signature before?

A. Yes.

Q. Has she ever been an employee of Reliable Electric Company, Inc.?

A. She was for some period of time. Not very long.

Q. How long did she work there?

A. I don't know. Maybe two or three months. Maybe less.

Q. It wasn't any more than two or three months?

A. Probably one, I'm not sure. I can't testify to that. I don't know.

ship between nominally separate entities where the two enterprises have substantially identical management, business purpose, operation, equipment, customers, and supervision. *Crawford Door Sales Co.*, 226 NLRB 1144 (1966).

In *Golden State*, supra at fn. 5, the Supreme Court held that a bona fide purchaser who acquires the “employing enterprise which was the locus of the unfair labor practice” with knowledge that the “wrong remains unremedied” may be held responsible for the remedy. In reaching this conclusion, the Court relied heavily on its prior observations in *Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1945), that a Board remedial order may apply “in appropriate circumstances . . . [to] those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons.” Based on the principles of these cases, I conclude that liability to remedy Company’s unfair labor practices extends to Construction.

In my judgment, it is unnecessary to resolve the question of Construction’s true ownership as the evidence detailed above establishes conclusively that Construction is Company’s successor under either the *Regal Knitwear* or *Golden State* doctrines and its alter ego. Even if Robert’s putative ownership of Construction is accepted, I would still conclude that Construction is Company under the *Crawford* criteria. Both retained their essential character as closed corporations with only a slight rearrangement of corporate officers—all within the Prilika family—and a slightly different name. Apart from that, Construction, admittedly seeking to maintain the name recognition resulting from an operation that spanned half a century, continued Company’s operations from the same location with the same management, supervisors, core employees, and, in the main, the same suppliers in order to complete Company’s work in progress before moving on to other available jobs as Company undoubtedly would have done had Construction never existed. In addition, the early history of Construction’s Westminster bank account discloses conclusively, in my judgment, that Construction is little more than a new name for Company. Even assuming that Construction may focus on some different areas of electrical contracting as claimed, that minor change in focus has no legal significance.

But regardless of the conclusion that I have reached about Construction’s alter ego status, Construction undoubtedly qualifies as a successor with knowledge responsible for remedying Company’s unfair labor practices. Even though I do not credit Robert Prilika’s claim that he lacked knowledge of this case until contacted by the General Counsel in 1992, I find that Robert’s prior knowledge of this remedial order, or lack thereof, is really of no moment. Clearly Anthony, an officer, director, and active in the management—whether in the form of his own personal assets or that of Company’s which he controlled—knew of the Board’s Order. For these reasons, Anthony’s knowledge is imputable to Construction for purposes of a *Golden State-Regal Knitwear* analysis. See, e.g., *Sahara Las Vegas Corp.*, 284 NLRB 337, 341–342 (1987), imputing knowledge of an unfair labor practice charge to successor where predecessor’s lawyer disclosed its existence to successor’s lawyer during sale negotiations. Accordingly, I will recommend that the Board hold Construction jointly and severally liable with Company for the backpay due here. I will also recommend that the Board order Construction to offer reinstatement to those living discriminatees who have not yet removed themselves from the labor market.

3. Anthony Prilika’s personal liability

In *White Oak Coal*, 318 NLRB 732 (1995), the Board adopted the following two-pronged test, derived from Federal common law and applied in *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047 (10th Cir. 1993), for piercing the corporate veil to impose personal liability on a shareholder:

Under Federal common law, the corporate veil may be pierced when (1) there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct, and (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.

When assessing the first prong to determine whether the shareholders and the corporation have failed to maintain their separate identities, we will consider generally (a) the degree to which the corporate legal formalities have been maintained, and (b) the degree to which individual and corporate funds, other assets, and affairs have been commingled. Among the specific factors we will consider are: (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation’s ownership and control; (5) the availability and use of corporate assets, the absence of same, or undercapitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintain an arm’s length relationship among related entities; (8) diversion of the corporate funds or assets to noncorporate purposes; and, in addition, (9) transfer or disposal of corporate assets without fair consideration.

When assessing the second prong, we must determine whether adhering to the corporate form and not piercing the corporate veil would permit a fraud, promote injustice, or lead to an evasion of legal obligations. The showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from misuse of the corporate form. Further, the individuals charged personally with corporate liability must be found to have participated in the fraud, injustice, or inequity that is found.

Adherence to corporate formalities is virtually nonexistent throughout this case. Moreover, nearly all of this renegade conduct is attributable to Anthony Prilika. Loans by the Prilikas to Construction are undocumented and of uncertain amounts so that the actual amount of Anthony Prilika’s equitable interest in Construction can be ascertained with only a marginal degree of certainty. No real records exist which would allow a determination of the actual market value of the contribution in equipment and supplies from Company to Construction. Company’s funds were deposited in Construction’s account before Construction commenced any operations or performed any work. Company’s employees were paid from funds in Construction’s accounts. Tax returns purportedly contained erroneous statements of ownership although I seriously doubt that. Accounting records obviously commingled the assets of Construction and Company, and were used in obtaining credit and bonding for Construction, an otherwise seriously undercapitalized entity. Full disclosure of corporate identities were

not made to important customers and the corporate designation was used for substantial periods before incorporation occurred in Construction's case and not at all in the instance of Reliable Construction, the entity through which tax withholding payments were made. Construction allowed Anthony to treat his salary compensation as a loan repayment and vehicles purportedly purchased with Construction's money were titled in the name of another Prilika entity owned and controlled by Anthony. In sum, I conclude that ample evidence exists to support the conclusion "that the personalities and assets" of Company, Construction, and Anthony Prilika "are indistinct."

Would the failure to pierce these corporate veils permit a fraud, promote injustice, or lead to an evasion of legal obligations? In my judgment, that question deserves an affirmative answer. In essence, Company, the corporate entity liable under the Board's original order, has vanished but its substantive core continues as Construction, a corporate entity so recklessly managed that even its actual ownership cannot be ascertained with certainty. However, it is abundantly clear that Anthony's equitable interest and personal involvement in Construction is so pervasive that it is unlikely it would have existed or would continue to exist without his personal backing. The evidence in this case shows that Anthony obviously infused Construction with the necessary cash, supplies, and equipment—some of it his own, most of it Company's—to permit its operation without regard to corporate formalities or candid disclosures to tax and regulatory authorities, retained accounting professionals, creditors, insurers, customers, or employees. Should Anthony decide to withdraw that support, Construction would likely become another empty shell and its legal obligations, including the backpay liability in this case, would go unsatisfied. Where, as here, the evidence implicates Anthony personally in avoidance schemes, such as using the net-loss carryovers obviously generated by his defunct corporation to offset the tax liability of an ongoing enterprise he now claims he does not own, an extreme risk of fraud, injustice and disregard for legal obligations exists if the law fails to look beyond the corporate veils he has constructed and perpetrated. Accordingly, I will recommend that the Board hold Anthony personally liable, jointly, and severally, with Company and Construction for the backpay due in this case.

III. THE BACKPAY COMPUTATION

The calculation of the gross backpay is the beginning point in the computation of backpay for unlawfully discharged employees. The term "gross backpay" refers to an approximation of what an employee would have earned absent the unlawful discrimination. As the gross backpay due often cannot be determined with scientific precision, the General Counsel need only employ a formula designed to produce a reasonable approximation of what is owed. *Intermountain Rural Electric Assn.*, 317 NLRB 588, 591 (1995), *enfd.* in an unpublished order and judgment in No. 95-9529 (10th Cir. Apr. 22, 1996). Here, the compliance officer, Cynthia Renkel, was particularly hampered in the calculation of the gross backpay because no payroll records were furnished to aid in the computation of the gross backpay until shortly before this hearing.

Nevertheless, the compliance officer's backpay formulation here is a standard calendar quarterly computation provided for in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with offsets for net interim earnings. Respondents do not challenge the few offsetting expenses in arriving at the net interim earnings. To

determine the quarterly gross backpay, the compliance officer multiplied the imputed quarterly hours by the applicable contract rate for all periods prior to June 1, 1984, and by \$16 per hour thereafter.¹⁷ As none of the discriminatees have been offered reinstatement, the General Counsel contends that backpay continues to accrue unless tolled for some other reason.¹⁸

Although Respondents do not challenge the compliance officer's basic gross backpay methodology, i.e., imputing 40 hours of work per week to each discriminatee and multiplying the resultant quarterly hours by an imputed wage rate, they do make a number of specific challenges to the gross backpay computation. First, Respondent argues that as all of the discriminatees were referred from the Union's hiring hall for work on Company's projects at the Rocky Flats Nuclear Weapons Facility or the city of Westminster Municipal Center, backpay should be tolled when those projects were completed as all of the discriminatees would have been laid off and never referred again to Company as it had legitimately become an "open shop." Second, Respondents alternatively argue that liability should end as of June 1, 1984, on the theory that Company would have been entitled to repudiate the commercial agreement at that time and, as shown in the underlying case, the discriminatees would not have worked for a nonunion shop. Third, the imputed hourly rate used in the computation of gross backpay should be \$12 rather than \$16 as the former is the highest journeyman rate paid by both Company and Construction in succeeding years. Fourth, no basis exists for including medical expenses after June 1, 1984, as neither Company nor Construction provided health benefits to their employees. And fifth, certain individual circumstances warrant the adjustment of the gross backpay and interim earnings of discriminatees Knoke, Holcomb, Jackson, and Wittwer.

Before turning to those specific contentions, I find that the Acting Regional Director acted reasonably in the circumstances by imputing 40 hours of work to the discriminatees throughout the backpay period in making the gross backpay computation. It would appear that he had little other choice because Company failed to furnish pay records to aid in the backpay computation, despite repeated demands that it do so, until shortly before the hearing. Anthony Prilika explained that those records had not previously been furnished as required under Section 2(d) of the Board's enforced order (286 NLRB at 837) because the originals had been destroyed during a basement flood at the South Broadway premises in July 1990. He furnished an insur-

¹⁷ The hourly rate for journeymen electricians under the commercial agreement was \$17.85. The compliance officer applied that rate for all hours in the first and second quarters of 1984 until June 1 in calculating the backpay for Belshe, Holcomb, Jackson, and Knoke. She did not similarly apply that rate for the same period in MacIntyre's calculation. This appears to be an inadvertent error as no explanation appears for not having treated him similarly. Accordingly, I have corrected this apparent error in the recalculations I have made below. As Wittwer did not complete his apprenticeship until August 1994, the compliance office applied the appropriate apprentice rate from the commercial agreement in calculating his gross backpay for that period.

¹⁸ Thus, Belshe is dead. Holcomb fully retired as of December 1989. Jackson retired December 1, 1994, but his retirement was made retroactive to June 1994 when he ceased active employment due to his poor health. Obviously, Belshe's backpay has been tolled. I further find that Jackson's backpay has been tolled as his retirement resulted from serious illnesses. Although Holcomb's situation is less clear due to his inability to find work at that time, I likewise conclude that the accrual of backpay has tolled in his case also.

ance agent's letter which corroborates that Company's records were destroyed. (R. Prilika Exh. 2.) He further explained that a copy of those records (R. Exhs. 29 through 34—Company's individual earnings records from 1984 through 1989) were located in his former attorney's files shortly before the hearing and were promptly furnished. This latter explanation only makes matters worse. Once the court of appeals enforced the Board's Order, that attorney must have known, or should have known, that the production of records to aid in this computation ceased to be a matter of voluntary cooperation and became a legal duty.¹⁹ Although I have now received those records in evidence and have utilized the 1984 records (R. Exh. 29) in certain recalculations pertaining to the first and second quarters of that year, I have concluded that neither I nor the Acting Regional Director have a legal obligation to further delay this matter in order to revise the entire 2-inch thick backpay computation because Company belatedly furnished records required under the terms of a court order.²⁰

A. The Tolling Issues

I reject the claims that the backpay period should be tolled by the completion of Rocky Flats or Westminster jobs, or by the termination of the commercial agreement on June 1, 1984. Even assuming that these employees were originally referred to Company for employment at these projects, Respondents adduced no evidence (other than certain self-serving assertions by Anthony which I do not credit) to support its claim that the six employees at issue were hired solely for those two projects or that all others employed there were laid off when those projects ended. Instead, the offers Anthony made to these employees in January 1984 strongly suggest that he contemplated their continued employment. Moreover, Judge Litvack's findings in the underlying case undermine the claim that these employees had been hired for particular jobs. 286 NLRB at 842 fn. 18. Hence, I find that Respondents failed to meet their burden of showing that these six employees, or any one of them, would have been laid off at the completion of those two jobs. *Dean General Contracting*, 285 NLRB 573 (1987).

In reaching the foregoing conclusion, I reject Respondents' premise that the equities lie with it in terminating the backpay period because it has now been proven that Company had "legitimately gone open shop at that time." In effect, this claim asserts it has now been shown that the Board's original decision is predicated on an erroneous factual conclusion that Company was bound to the 1983 commercial agreement. In support, Respondents rely on the minutes of a joint labor-management meeting on December 16, 1982, showing that NECA representatives advised the Local 68 agents that "numerous contractors . . . have canceled their collective bargaining authorization and . . . NECA is therefore not representing [them]." The list of those contractors included Company. (R. Exh. 35.) These minutes are obviously the minutes Anthony referred to in a

December 8, 1983 letter to Local 68 Agent Heffernan that is quoted in Judge Litvack's decision. 286 NLRB at 841.

The Board's original decision makes clear that the thread binding Company to the 1983 commercial agreement was not Company's membership in NECA. Rather, Company's obligations under the 1983 commercial agreement arose from its execution of the Letter of Assent-A in 1976 and its failure to timely notify the Local 68 or NECA in writing, as required by its terms, that it wanted to terminate its 1976 Letter of Assent-A. Based on Judge Litvack's findings, the Board concluded "no such notice [terminating the Letter of Assent-A] had been given at the time the . . . commercial agreement was executed or the following winter when [Company] repudiated that agreement. 286 NLRB at 836. In his decision, Judge Litvack discussed at length other evidence similar to the December 16 minutes Respondents' fashion their current argument from and concluded, nonetheless, that the evidence failed to show that Prilika properly terminated the 1976 Letter of Assent-A."²¹

Respondents' further claim that the backpay should be tolled as of June 1, 1984, on the theory that Company could have lawfully repudiated the agreement as of that date would require, in effect, that I rewrite the Board's remedial order in this case which I lack authority to do. *Lenz Co.*, 153 NLRB 1399 (1965). This argument also ignores the fundamental fact that the remedial action in this case has now been twice considered by the Board. The Board's Order as it now stands unmistakably contemplates a remedy for the six discriminatees involved here beyond that time when Respondent could have lawfully repudiated the commercial agreement. Consequently, I am bound to give effect to that requirement.

B. The Gross Backpay Hourly Rate

Compliance Officer Renkel testified that, as she had no access to Company's pay records, she concluded on the basis of her investigation that the \$16 hourly rate used was the prevailing journeyman's rate in the Denver area among nonunion shops. Likewise, Renkel assumed that since Company paid for a medical benefits plan under the commercial agreement, it substituted another plan when the agreement was repudiated in 1984.

Based on the pay records that have now been produced, Respondents argue that throughout the period following Company's repudiation of the commercial agreement, both Company and Construction employed electricians in a pay range from \$9 to \$12 per hour. Although Respondents concede that it paid some electricians above this range, they contend that they did so only in those instances where an individual possessed additional skills (such as welding) or worked as a foreman. None of the discriminatees, Respondents assert, were qualified to serve as a foreman and none had any special skills which would merit a rate more than \$12 per hour. Consequently,

¹⁹ I intend no aspersions on the conduct of Attorney Collyar. Indeed, he was obviously instrumental in the production of the pay records and his conduct at this hearing was otherwise exemplary.

²⁰ Even if such a massive recalculation were undertaken, it is not at all certain that appreciable differences would result. Thus, the pay records might facilitate the use of a replacement group theory to determine the hours which should be credited to the discriminatees throughout the backpay period. However, pursuit of that theory could lead to adjustments of the applicable hourly rates for those occasions when Company would have been obliged to pay higher prevailing wage rates.

²¹ Thus, Judge Litvack specifically found that "there is no dispute that during the November 18, 1982 labor-management committee meeting . . . [NECA director] Massey listed the contractors who had canceled their bargaining authorizations to NECA and for whom the association was not bargaining and included [Company] among the enumerated contractors." 286 NLRB at 840. Despite this evidence, Judge Litvack ultimately concluded that Anthony "never mailed any document to NECA, with a copy to the Union"—as he claimed that he had done—"in which he rescinded Respondent's prior authorization to NECA to represent it in bargaining with the Union." 286 NLRB at 847.

Respondents believe the backpay computation should be recalculated using a \$12 rate.

Although the payroll records do reflect that Respondents paid a number of individuals in the \$9 to \$12 range, the records further reflect that Company had already begun paying the five journeymen at a \$15-per-hour rate in the last 2 weeks of their employment. (R. Exh. 29.) In addition, at least two other journeyman electricians, Goodwin and McFarren, who were employed by Company at the same time were also paid at the contract rate in the first 2 weeks of January 1984 and at the \$15 an hour rate thereafter.²² Moreover, as the underlying case shows, Anthony specifically offered to employ the discriminatees at \$15 per hour.²³ In view of these facts, I reject Respondents' claim that the gross backpay should be calculated using a \$12-per-hour rate.

However, I have likewise concluded that the compliance officer's use of a \$16-an-hour rate from the outset of the noncontract period (June 1, 1984) is not warranted. Instead, I find the most reasonable rate to employ commencing on June 1, 1984, would be \$15 per hour for all discriminatees except Wittwer and that the rate should be changed to \$16 per hour commencing with the first quarter of 1986. I find that changing the rate at that time is justified by the evidence pertaining to Steven Goodwin, the only individual whose employment overlapped with that of the discriminatees and who remained continuously employed by both Company and Construction.

Respondents' claim that Goodwin's higher rate reflects his status as foreman. However, at the time the discriminatees worked at Company, Goodwin received the journeyman electrician's rate under the contract and, thereafter, \$15 per hour until the first pay period in January 1986, when his rate increased to \$16 per hour. Although Goodwin testified that he is now a foreman, no evidence indicates when he acquired that status or whether the foreman's position he now holds was accompanied by a pay increase. In addition, Goodwin testified that he still occasionally works as an electrician rather than as a foreman and that his rate of pay does not change in that circumstance. Accordingly, in light of Goodwin's overlapping tenure with the discriminatees and the similarity of their pay rates at that time, I have concluded Goodwin's increase in 1986 warrants adjusting the rate used for the calculating of the gross backpay from \$15 to \$16 per hour commencing with the first quarter of 1986.

In January 1984, Wittwer was an apprentice electrician in Company's employ. He completed his 4-year apprenticeship in August 1984. The compliance officer calculated Wittwer's gross backpay for in the amended specification at the hourly rate of \$12.50 for the entire first quarter of 1984, consistent with the wage rate specified in the commercial agreement for fourth year apprentices, first 6 months. (R. Exh. 1 at p. 37.) The compliance officer then calculated Wittwer's gross backpay for the entire 1984 second quarter and 160 hours of the 1984 third quarter using the hourly rate of \$14.28 specified in the commercial agreement for fourth-year apprentices, second 6 months. Thereafter, the compliance officer applied the \$16 per hour rate used in the calculations for the other discriminatees. However, in calculating the trust fund contributions due on

Wittwer's behalf, the compliance officer changed Wittwer's rate from \$12.50 to \$14.28 effective March 1984.

Wittwer testified that he became a journeyman in August 1984 but did not specify when his change in status occurred that month. I have recalculated Wittwer's gross backpay to more closely conform to the applicable commercial agreement and the circumstances described in the underlying case. Thus, I find that Wittwer would have become eligible for the higher apprenticeship rate effective February 1984. Accordingly, I have increased Wittwer's applicable hourly rate from \$12.50 to \$14.28 for 360 hours in the first quarter of 1984. My gross backpay calculation for the second quarter of 1984 credits Wittwer with 360 hours at his \$14.28 apprenticeship rate and 160 hours (June 1984) at the \$15 rate applicable to all remaining discriminatees. In succeeding quarters, I have treated Wittwer in the same manner as the other discriminatees.

In my judgment, Judge Litvack's findings in the underlying case warrants the application of the \$15-per-hour rate to Wittwer, a commercial wireman while employed by Company, at the same time as the other discriminatees rather than applying the lower apprenticeship rate until August 1984 as the compliance officer has done. Thus, at 285 NLRB at 844-845, Judge Litvack found that Anthony "gave a blank copy [of the Employment Agreement specifying the \$15 per hour rate] to James Belshe, instructing him to show it to the other members of his crew (Holcomb, Bob McFarren, Steven Goodwin and two apprentices, Napoleon Williams and Dale Wittwer)." A separate employment agreement was tendered to the residential wiremen specifying an \$11 hourly rate. Subsequently, Judge Litvack found that Wittwer requested that Anthony lay him off as he had learned of the wage rate offer of \$15 per hour with no fringe benefits and no support of the apprentice program. The following day, when Wittwer's layoff request was denied, he quit.

Although Judge Litvack's findings might be regarded as ambiguous as to the narrow issue now considered, I find that they provide a sufficient basis for concluding that Anthony intended similar treatment for all-existing commercial wiremen without regard to their journeyman or apprentice status. Even though Anthony's agreement would have increased Wittwer's pay rate, Wittwer's acceptance of that agreement under some lawful circumstance clearly would have resulted in a lesser overall cost to Company because of the fringe benefits costs under the commercial agreement. This would be especially true after Wittwer's rate increased to \$14.28 as scheduled in February. Accordingly, I have concluded that these circumstances merit the application of the \$15-per-hour rate to Wittwer at the same time as the other discriminatees.

Finally, as the 1984 individual employment records (R. Exh. 29) for Belshe, Knoke, Holcomb, Jackson, and MacIntyre reflect that they were compensated for work while still employed at the \$15-per-hour rate, I have added a separate reimbursement calculation for the difference between that rate and the applicable commercial agreement rate (\$17.85) for those under-compensated hours in accord with *Ogle Protection*, supra, for the first quarter 1984 as specified in the Board's Order. The hours used in this calculation are: Belshe-60; Holcomb-40; Jackson-56; Knoke-56.5; and MacIntyre-48.5. Wittwer's individual employment record is not included in that exhibit and it is otherwise unclear what, if anything, actually occurred as to his pay rate while still employed.

²² A third individual named Steward was also paid the \$15 rate but it appears that he was the service manager at that time. 286 NLRB at 842.

²³ See employment agreement quoted in haec verba by Judge Litvack. 286 NLRB at 843, 844.

C. The Medical Expense Reimbursements

The *Kraft Plumbing* rule providing for the reimbursement of unlawfully terminated employees “for any premiums they may have paid to third-party insurance companies to continue medical and dental coverage” establishes that payment, in effect, as a part of the gross backpay. As such, the General Counsel has the burden to establish a discriminatee’s qualification for the insurance premium reimbursement. *Mastro Plastics*, 136 NLRB 1342, 1346 (1962). To meet this burden, the General Counsel would be required to provide evidence that Company or Construction, or both, actually provided its employees with a paid health insurance benefit after June 1, 1984.

Here, the General Counsel seeks such a reimbursement with interest for three discriminatees, Bruce Knoke (\$6447), Bill Jackson (\$664), and Kim MacIntyre (\$1514). In each case, the reimbursement sought is for premiums they paid to third-party insurance companies in calendar quarters after June 1, 1984, the date on which the commercial agreement ceased to be applicable for backpay purposes in this case. In each instance, the reimbursement sought is for the premiums the discriminatees were required to pay for coverage of their spouses or dependents rather than for themselves.

Compliance Officer Renkel testified that she included the insurance premium reimbursement in the backpay computation because, without information from Company, “I reasoned that [Respondents] probably continued some kind of health benefits.” However, the General Counsel adduced no evidence that either Company or Construction, in fact, ever actually provided health benefits to employees after Anthony repudiated the contract in January 1984. The three Prilikas (Anthony, Robert, and John) repeatedly denied that the employees ever received employer-paid health benefits after that time. Steven Goodwin corroborated their claim about this matter. Furthermore, the proposed individual employment agreement quoted by Judge Litvack in the underlying case provided that Company would provide a health benefit plan for the employee only and that the employee would be responsible for paying the added cost if he elected coverage for “qualified dependents.”²⁴

In these circumstances, I find that the General Counsel has failed to meet the burden of proof required to obtain reimbursement for these medical insurance premiums because there is no evidence that either Company or Construction actually provided employees with a health insurance benefit let alone a benefit that also included family members. Accordingly, I disallow the premium reimbursements claimed for Knoke, Jackson, and MacIntyre.

D. Respondents’ Claims for Individual Offsets

1. Knoke and Jackson

Respondents claim that the backpay calculations for Knoke and Jackson should be modified for their failure to respond to referral calls at the Local 68 hiring hall where they were registered. For this reason, Respondents would impute interim earnings based on the Local 68 contract wage rate to Knoke from December 1984 through March 1985 and to Jackson for the month of August 1984.

Local 68’s hiring hall records confirm that Knoke and Jackson were both registered on the out of work list at the times

relevant to Respondents’ claims. The same records also confirm that both were dropped to the bottom of the out-of-work list when they failed to respond to calls from Local 68 for referral to jobs as claimed by Respondents.

However, the evidence shows that both Knoke and Jackson had previously acquired interim employment as maintenance electricians with the Littleton Public School district. Both testified that as their new positions paid less than the Local 68 construction rate, they continued to register at the hiring hall in hopes of obtaining long-term construction employment. Both also claim that they made inquiries from time to time concerning long-term employment through the hiring hall but, as such work was not available, they chose not to risk the steady employment provided by the school district for the short-term employment then available through the hiring hall.

As the compliance specification reflects, their interim earnings from the school district eventually exceeded their gross backpay and, prior thereto, served as a substantial offset to the gross backpay for a considerable period. In these circumstances, I find that Knoke and Jackson did not incur a willful loss of earnings by their failure to accept the referrals alluded to by Respondent. Accordingly, I reject Respondents’ proposed offset in their situations.

2. Robert Holcomb

Respondent claims that an early retirement benefit of \$500 per month which Holcomb drew from June through November 1988 should be “deducted from his backpay calculation.” Holcomb testified that after his unemployment benefits expired in June 1988 and he was still unable to locate work, he applied for early retirement benefits under the Local 68 pension plan in order to support himself. When Holcomb reached 62 in late November 1988, he considered himself actually retired and thereafter applied for a full Local 68 retirement and, shortly later, for social security. According to Holcomb, his need to draw early retirement benefits resulted in a 1-percent penalty under his full retirement. There is no evidence that Holcomb withdrew himself from the labor market until he commenced his full retirement in December 1988. The amended compliance specification tolled Holcomb’s backpay as of that time.

I deny Respondent’s request to offset Holcomb’s gross backpay with his early retirement benefits. In my judgment, those early retirement benefit sums drawn by Holcomb from June through November 1988 do not represent compensation for services rendered to an interim employer and, therefore, do not properly qualify as interim earnings deductible from the gross backpay. And where, as here, Holcomb’s circumstances necessitated these early withdrawals for which he was penalized when he fully retired, I likewise conclude that it would be inappropriate to toll the accumulation of his gross backpay when he commenced receiving those funds in June.

3. Dale Wittwer

Wittwer testified that he obtained interim employment at the Rocky Mountain News in August 1985. The compliance officer testified that she did not have access to that company’s pay records and, hence, calculated his interim earnings by dividing those 1985 earnings reflected on his W-2 tax statement furnished to him by that company. At the hearing, Respondent obtained a more detailed statement of Wittwer’s 1985 earnings from that interim employer and requests a recalculation of his 1985 backpay reflecting this more accurate information. I agree and the calculations reflected in attachment 6 are in ac-

²⁴ See also the findings by Judge Litvack in the underlying case, 285 NLRB 842 fn. 20.

cord with the quarterly allocation of 1985 interim earnings reflected in Respondents' alternate calculation. (R. Exh. 41.)

E. Additional Matters

As noted, the only backpay controversy alleged in the compliance specification relates to the amounts due the six discriminatees. As the basis for this allegation is unexplained but probably lies in the lack of access to Company's pay records, I have prepared additional calculations reflected in attachments 7 and 8, and modified the Acting Regional Director's calculations concerning the required trust fund contributions (attachment 9) to accord with the evidence in the underlying case, the Board's remedial order, and the evidence adduced at this hearing.

Attachments 7 and 8 include *Ogle* reimbursements for Steven Goodwin and Robert McFarren. In the underlying case, the Board specifically found that Goodwin and McFarren were commercial wiremen who continued their employment with Company following the repudiation of the commercial agreement. 286 NLRB at 835. Company's 1984 records (R. Exh. 29) confirm that conclusion. Hence, under the terms of the Board's Order they would be entitled to a reimbursement for the losses they suffered as a consequence of Company's failure to pay them at the \$17.85 journeyman's rate under the commercial agreement. Company's pay records reflect that both received \$15 per hour commencing with Company's pay period ending January 21, 1984, as did the other journeyman discriminatees. Accordingly, under the Board's *Ogle* remedy, Goodwin and McFarren would be entitled to a reimbursement for the difference between the \$15 rate they actually received and the commercial agreement rate for all hours worked through May 31, 1984. Attachments 7 and 8 reflect the calculations for Goodwin and McFarren applying the difference in rates (\$2.85) to the hours they actually worked.²⁵

Attachment 9 reflects the recalculation I have made for the trust fund reimbursement under the terms of the Board's Order. In the amended specification appendices, the compliance officer has imputed 40 hours of work per week for the six discriminatees throughout the month of January 1994. Based on their individual earnings records (R. Exh. 29), I have concluded that this would be inappropriate as it is evident that the five journeyman discriminatees did not work 40 hours in the weeks preceding the pay period ending January 21. Accordingly, I have used the actual hours reflected for those pay periods and imputed 40 hours to them for the remaining pay period ending January 28 if they did not actually work that amount due to the likelihood that they did not do so because of the constructive discharge. In addition, this recalculation has been made to reflect trust fund reimbursements on behalf of Goodwin and McFarren. As Wittwer's individual earnings record is not reflected in Respondent Construction's Exhibit 29, I have credited him with the average of the hours credited to the others for the month of January for trust fund reimbursement purposes.

The compliance specification seeks reimbursement for seven fringe benefit funds. The 1983 commercial agreement specifies the following fixed hourly rate for contributions to four of those

funds: (1) Electrical Industry Benefit Health Fund (EIB Health)—\$1.24; (2) EIB Long-Term Disability Fund (EIB Disability)—\$.03; (3) EIB Accidental Life Insurance Fund (EIB Insurance)—\$.08; and (4) Eighth District Electrical Pension Fund (Pension)—\$1.25. Contributions to the other three funds are computed on the basis of the following percentages of the employer's gross monthly payroll (gmp): (1) National Employee's Benefit Fund (NEBF)—3 percent of gmp; (2) National Electrical Industry Fund (NEIF)—1 percent of gmp; and (3) Joint Apprenticeship and Training Trust Fund (JAT)—0.3 percent of gmp. (R. Exh. 1 at pp. 23, 32–37.)²⁶ In computing the gross monthly payroll, I have applied the commercial agreement journeyman rate (\$17.85) for all hours except those credited to Wittwer. In his case, I have applied the apprentice rates of \$12.50 for his January 1984 hours and \$14.28 for all subsequent hours. Consistent with the compliance specification, the recalculation reflected in Attachment 9 provides for no interest.

IV. SUMMARY

Based on my findings and conclusions, above, backpay under the terms of the remedial order in this case is due the following individuals: James Belshe, Steven Goodwin, Robert Holcomb, Bill Jackson, Bruce Knoke, Kim MacIntyre, Robert McFarren, and Dale Whittwer. The calculation of the amount of backpay due each of these individuals as of January 31, 1993, with interest on those amounts through August 31, 1996, is as set forth in attachments 1 through 8 hereto.²⁷ The interest factors used in calculating interest are set forth in attachment 10. Additional backpay could accrue to Knoke, MacIntyre, and Whittwer until such time as they receive an appropriate written offer of reinstatement required by the Board's Order. The accrual of backpay to Belshe has been tolled by reason of his death and the amount of backpay due to him is payable to his estate. Backpay due Jackson has been tolled by reason of his withdrawal from the labor market as evidenced by his retirement for health reasons and backpay due Holcomb has been tolled by his full retirement.

Reimbursements for unpaid trust fund contributions required under the terms of the Board's Order are due to the following trusts established under the commercial agreement: (1) Electrical Industry Benefit Health Fund; (2) Electrical Industry Benefit Long-Term Disability Fund; (3) Electrical Industry Benefit Accidental Life Insurance Fund; (4) Eighth District Electrical Pension Fund; (5) National Employee's Benefit Fund; (6) National Electrical Industry Fund; and (7) Joint Apprenticeship and Training Trust Fund. The calculation of the reimbursement amount due each of these funds is as set forth in attachment 9. No interest is claimed or due in connection with these unpaid contributions.

Company, Construction, and Anthony Prilika in his personal capacity are jointly and severally responsible for the satisfaction of the backpay, interest, and trust fund reimbursements

²⁵ Based on the 1984 records, I credited Goodwin and McFarren, respectively, with 389.5 and 389.25 hours in the first quarter, and 408.5 and 363.5 hours in the second quarter. As the records show that Goodwin and McFarren both worked 32 hours in the pay period ending June 2, I have deducted 16 hours from their total hours in the second quarter to account for the fact that the *Ogle* remedy applied only through May 31, 1984.

²⁶ The 1983 commercial agreement also specifies a \$1 per hour employer contribution to the Eighth District Annuity Fund. R. Exh. 1 at pp. 34–35. The compliance specification seeks no reimbursement for that fund. As that fund does not appear in the successor agreement (R. Exh. 2) and as there appears to have been a controversy over the 1983 commercial agreement resulting in a "settlement agreement," the terms of which are not before me, I likewise include no reimbursement for that fund.

²⁷ In all calculations I have made, I applied the Federal income tax rounding rule.

presently due. Those same persons are also responsible in the same manner for the satisfaction of any additional amounts of backpay which may have accrued since January 31, 1993, or which may accrue in the future, as well as interest on those amounts and the amounts presently due calculated to the date of payment.

On the foregoing findings and conclusions, I issue the following recommended²⁸

ORDER

The Respondents, Reliable Electric Company; Reliable Electric Construction Company, Inc.; and Anthony Prilika their officers, agents, successors, and assigns, shall

1. Jointly and severally pay the amounts of backpay with additional interest calculated from September 1, 1996, to the date of payment, less appropriate withholdings for any Federal, state, and local income taxes, set forth below opposite the names of the following individuals or, in the case of James Belshe, his estate:

James Belshe Estate	\$ 50,303
Wesley Steven Goodwin	4,971
Robert Holcomb	175,144
Bill Jackson	93,606

²⁸ If no exceptions are filed as provided by Sec. 102.59 and 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes. All pending motions inconsistent with this recommended order are denied.

Bruce Knoke	111,037
Kim MacIntyre	30,513
Robert McFarren	4,691
Dale Wittwer	29,109

2. Jointly and severally pay any additional amounts of backpay which may have accrued since January 31, 1993, or which may accrue hereafter, to Robert Holcomb, Bruce Knoke, Kim MacIntyre, and Dale Wittwer together with interest thereon calculated to the date of payment, less the appropriate income taxes specified above.

3. Immediately offer in writing to reinstate Bruce Knoke, Kim MacIntyre, and Dale Wittwer in accord with the terms of the Order of the National Labor Relations Board dated November 9, 1987, as enforced on May 2, 1992.

4. Jointly and severally reimburse the trusts funds named below in the amounts specified:

Electrical Industry Benefit Health Fund	\$7,870
Electrical Industry Benefit Long-Term Disability Fund	191
Electrical Industry Benefit Accidental Life Insurance Fund	507
Eighth District Electrical Pension Fund	7,933
National Employee's Benefit Fund	3,308
National Electrical Industry Fund	1,102
Joint Apprenticeship and Training Trust Fund	331

ATTACHMENT 1 BELSHE, JAMES HENRY

YR./QTR.	TOTAL GROSS BACKPAY	NET INTERIM EARNINGS	NET BACKPAY	INTEREST THRU 8/31/96	TOTAL AMOUNT DUE
84/1 (Ogle)	\$ 171	N/A	\$ 171	\$ 205	\$ 376
84/1	6,997	0	6,997	8,396	15,393
84/2	8,826	0	8,826	10,348	19,174
84/3	8,100	\$ 5,273	2,827	3,237	6,064
84/4	8,100	7,343	757	846	1,603
85/1	8,100	7,038	1,062	1,152	2,214
85/2	8,100	8,079	21	22	43
85/3	8,100	9,082	0	0	0
85/4	8,100	7,394	706	704	1,410
86/1	8,320	9,362	0	0	0
86/2	8,320	7,667	653	619	1,272
86/3	8,320	10,071	0	0	0
86/4	8,320	7,800	520	469	989
87/1	8,320	7,381	939	826	1,621
87/2	8,320	8,499	0	0	0
TOTALS			\$23,479	\$26,824	\$50,303

ATTACHMENT 2 HOLCOMB, ROBERT

YR./QTR.	TOTAL GROSS BACKPAY	NET INTERIM EARNINGS	NET BACKPAY	INTEREST THRU 8/31/96	TOTAL AMOUNT DUE
84/1 (Ogle)	\$ 114	N/A	\$ 114	\$ 137	\$ 251
84/1	6,997	0	6,997	8,396	15,393
84/2	8,826	\$ 1,205	7,621	8,936	16,557
84/3	8,100	6,131	1,969	2,255	4,224
84/4	8,100	934	7,166	8,008	15,174

85/1	8,100	3,571	4,529	4,914	9,443
85/2	8,100	7,737	363	382	745
85/3	8,100	7,737	363	372	735
85/4	8,100	4,964	3,136	3,128	6,264
86/1	8,320	11,530	0	0	0
86/2	8,320	627	7,693	7,289	14,982
86/3	8,320	6,521	1,799	1,664	3,463
86/4	8,320	7,065	1,255	1,133	2,388
87/1	8,320	678	7,642	6,725	14,367
87/2	8,320	6,103	2,217	1,901	4,118
87/3	8,320	6,612	1,708	1,426	3,134
87/4	8,320	5,086	3,234	2,620	5,854
88/1	8,320	0	8,320	6,510	14,830
88/2	8,320	0	8,320	6,302	14,622
88/3	8,320	0	8,320	6,094	14,414
88/4	8,320	0	8,320	5,866	14,186
TOTALS			\$91,086	\$84,058	\$175,144

ATTACHMENT 3
JACKSON, BILL

YR./QTR.	TOTAL GROSS BACKPAY	NET INTERIM EARNINGS	NET BACKPAY	INTEREST THRU 8/31/96	TOTAL AMOUNT DUE
84/1 (Ogle)	\$160	N/A	\$160	\$192	\$352
84/1	6,997	0	6,997	8,396	15,393
84/2	8,826	0	8,826	10,348	19,174
84/3	8,100	\$2,295	5,805	6,647	12,452
84/4	8,100	4,538	3,562	3,981	7,543
85/1	8,100	5,718	2,382	2,584	4,966
85/2	8,100	5,840	2,260	2,379	4,639
85/3	8,100	6,063	2,037	2,149	4,186
85/4	8,100	6,000	2,100	2,095	4,195
86/1	8,320	6,248	2,072	2,015	4,087
86/2	8,320	6,246	2,074	1,965	4,039
86/3	8,320	6,456	1,864	1,724	3,588
86/4	8,320	6,582	1,738	1,569	3,307
87/1	8,320	7,621	699	615	1,314
87/2	8,320	8,073	247	212	459
87/3	8,320	7,947	373	311	684
87/4	8,320	7,748	572	463	1,035
88/1	8,320	8,073	247	193	440
88/2	8,320	7,704	616	467	1,083
88/3	8,320	8,181	139	102	241
88/4	8,320	8,692	0	0	0
89/1	8,320	8,087	233	158	391
89/2	8,320	8,297	23	15	38
[No further calculation is shown as Jackson's interim earnings exceed the gross backpay in all subsequent quarters.]					
TOTALS			\$45,026	\$48,580	\$93,606

ATTACHMENT 4
KNOKE, BRUCE

YR./QTR.	TOTAL GROSS BACKPAY	NET INTERIM EARNINGS	NET BACKPAY	INTEREST THRU 8/31/96	TOTAL AMOUNT DUE
84/1 (Ogle)	\$ 161	N/A	\$ 161	\$ 202	\$ 363
84/1	6,997	0	6,997	8,396	15,393
84/2	8,826	\$ 653	8,173	9,583	17,756
84/3	8,100	3,658	4,442	5,086	9,528
84/4	8,100	4,590	3,510	3,922	7,432
85/1	8,100	5,196	2,904	3,151	6,056
85/2	8,100	5,252	2,848	2,998	5,846
85/3	8,100	5,508	2,592	2,657	5,249

85/4	8,100	5,689	2,411	2,405	4,816
86/1	8,320	5,568	2,752	2,676	5,428
86/2	8,320	6,034	2,287	2,167	4,454
86/3	8,320	5,952	2,368	2,190	4,558
86/4	8,320	6,028	2,292	2,069	4,361
87/1	8,320	7,042	1,279	1,126	2,405
87/2	8,320	7,251	1,069	917	1,986
87/3	8,320	7,432	888	741	1,629
87/4	8,320	7,251	1,069	866	1,935
88/1	8,320	7,037	1,283	1,004	2,287
88/2	8,320	7,105	1,215	920	2,135
88/3	8,320	7,497	823	603	1,426
88/4	8,320	7,654	666	470	1,136
89/1	8,320	7,400	920	623	1,543
89/2	8,320	7,497	823	533	1,356
89/3	8,320	7,722	598	369	967
89/4	8,320	7,900	420	248	668
90/1	8,320	8,466	0	0	0
90/2	8,320	8,108	212	113	325

[No further calculation is shown as Knoke's interim earnings exceed the gross backpay in all subsequent quarters.]

TOTALS		\$55,002	\$56,035	\$111,037
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ATTACHMENT 5
MACINTYRE, KIM

YR./QTR.	TOTAL GROSS BACK-PAY	NET INTERIM EARNINGS	NET BACK-PAY	INTEREST THRU 8/31/96	TOTAL AMOUNT DUE
84/1 (Ogle)	\$ 138	N/A	\$ 138	\$ 166	\$ 304
84/1	6,997	0	6,997	8,396	15,393
84/2	8,826	\$ 2,158	6,669	7,819	14,488
84/3	8,100	8,237	0	0	0
84/4	8,100	10,250	0	0	0
85/1	8,100	9,284	0	0	0
85/2	8,100	11,471	0	0	0
85/3	8,100	8,540	0	0	0
85/4	8,100	7,981	119	119	238
86/1	8,320	8,450	0	0	0
86/2	8,320	11,414	0	0	0
86/3	8,320	8,572	0	0	0
86/4	8,320	9,258	0	0	0
87/1	8,320	8,686	0	0	0
87/2	8,320	9,240	0	0	0
87/3	8,320	8,271	49	41	90

[No further calculation is shown as MacIntyre's interim earnings exceed the gross backpay in all subsequent quarters.]

TOTALS		\$13,972	\$16,541	\$30,513
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ATTACHMENT 6
WITTMER, DALE

YR./QTR.	TOTAL GROSS BACKPAY	NET INTERIM EARNINGS	NET BACKPAY	INTEREST THRU 8/31/96	TOTAL AMOUNT DUE
84/1	\$5,541	\$3,435	\$2,106	\$2,527	\$4,633
84/2	7,541	5,585	1,956	2,293	4,249
84/3	8,100	8,067	33	38	71
84/4	8,100	8,067	33	37	70
85/1	8,100	9,097	0	0	0
85/2	8,100	2,099	6,001	6,316	12,317
85/3	8,100	4,927	3,173	3,252	6,425
85/4	8,100	7,427	673	671	1,344

[No further calculation is shown as Wittmer's interim earnings exceed the gross backpay in all subsequent quarters.]

TOTALS		\$13,975	\$15,134	\$29,109
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ATTACHMENT 7
GOODWIN, WESLEY STEVEN

YR./QTR.	TOTAL GROSS BACKPAY	NET INTERIM EARNINGS	NET BACKPAY	INTEREST THRU 8/31/96	TOTAL AMOUNT DUE
84/1 (Ogle)	\$1,110	N/A	\$1,110	\$1,332	\$2,442
84/2 (Ogle)	1,164	N/A	1,164	1,365	2,529
TOTALS			\$2,274	\$2,697	\$4,971

ATTACHMENT 8
MCFARREN, ROBERT

YR./QTR.	TOTAL GROSS BACKPAY	NET INTERIM EARNINGS	NET BACKPAY	INTEREST THRU 8/31/96	TOTAL AMOUNT DUE
84/1 (Ogle)	\$1,109	N/A	\$1,109	\$1,331	\$2,440
84/2 (Ogle)	1,036	N/A	1,036	1,215	2,251
TOTALS			\$2,145	\$2,546	\$4,691

ATTACHMENT 9

	January 1984	February 1984	March 1984	April 1984	May 1984	
Belshe	132	160	160	160	160	
Goodwin	137	160.25	194.25	157.5	218.75	
Holcomb	136	160	160	160	160	
Jackson	137	160	160	160	160	
Knoke	141.5	160	160	160	160	
Macintyre	132	160	160	160	160	
McFarren	139	162.25	200	147.5	176	
Wittwer	139	160	160	160	160	
Total Hours	1090.5	1,282.5	1,354.25	1,265	1,354.75	
Gross Monthly Payroll	\$18,738	\$22,322	\$23,602	\$22,009	\$23,611	
	January 1984	February 1984	March 1984	April 1984	May 1984	Total
EIB Health (\$1.24/hr.)	\$1,352	\$1,590	\$1,679	\$1,569	\$1,680	\$7,870
EIB Disabilty (\$1.24/hr.)	33	38	41	38	41	191
EIB Insurance (\$1.24/hr.)	87	103	108	101	108	507
Pension (\$1.25/hr.)	1363	1603	1693	1581	1693	7933
NEBF (3% gmp)	562	670	708	660	708	3308
NEIF (1% gmp)	187	223	236	220	236	1102
JAT (0.3% gmp)	56	67	71	66	71	331

ATTACHMENT 10

Cumulative Interest Rate Percentages for Interest Through August 31, 1996.

R/QTR.	RATE PERCENTAGE
84/1	120.00
84/2	117.25
84/3	114.50
84/4	111.75
	108.50
85/1	
85/2	105.25
85/3	102.50
85/4	99.75
	97.25
86/1	
86/2	94.75
86/3	92.50
86/4	90.25
	88.00
87/1	
87/2	85.75
87/3	83.50
87/4	81.00
	78.25
88/1	
88/2	75.75
88/3	73.25
88/4	70.50
	67.75
89/1	
89/2	64.75
89/3	61.75
89/4	59.00
	56.25
90/1	
90/2	53.50
90/3	50.75
90/4	48.00